United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2295

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P/S

United States Court of Appeals

For The Second Circuit

FANNY HANDEL,

Plaintiff-Appellee,

vs.

MEYER GOLD,

Defendant-Appellant,

and

PREL CORPORATION,

Defendant.

On Appeal from an Order from the United States District Court — Southern District of New York

REPLY BRIEF FOR DEFENDANT-APPELLANT

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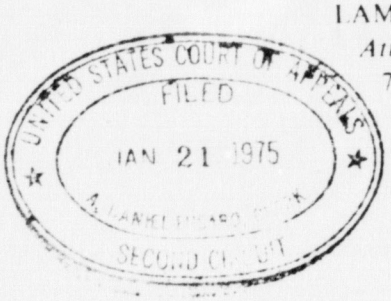

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Plaintiff and defendant appellees ("appellees") have failed to address themselves to most of the defendant-appellant's ("appellant") arguments and authorities. Indeed, in large measure, their briefs are an attempt to justify their actions in disregarding the realistic demands of the situation. When appellees do come to grips with some of the matters raised in appellant's brief, their arguments are often based on assertions that have no record references and, indeed, assertions that are actually contradicted by the record.

In an effort to obscure the fact that the District Court did not hold the required evidentiary hearing to determine the truth of the matters and issues presented in the defendant's moving affidavits, the following is asserted:

Page 11 of plaintiff-appellee's brief — "At a hearing before Judge Duffy on Gold's motion to vacate the judgment against him based upon mistake or excusable neglect, neither Gold himself nor William Kaufman, Esq. appeared."

Page 8 of defendant-appellee's brief — "The District Court summarily denied Gold's motion after a full hearing thereon and asserted complete review of the entire record of this case."

Page 25 of the defendant-appellee's brief — "if counsel rather than the client were at fault and if serious efforts to obtain new counsel had been made under the handicaps described, then the order entering the default judgment was an abuse of discretion." 504 F.2d at 712. The appellees continually referred to a hearing throughout their respective briefs. A review of the record shows that the so-called "hearing" was in fact "oral

arguments." The appellees are well aware of the fact that the "oral arguments" held before Judge Duffy without the presence of a court reporter was not a hearing. There were several questions of fact which could not and should not have been decided against the defendants by choosing one piece of paper over the other without the benefit or oral testimony and cross-examination. See *Dorsey v. Academy Moving and Storage, Inc.*, 423 F.2d 858, 860 (5th Cir. 1970); *Federal Deposit Insurance Corp. v. Acker*, 234 F.2d 113, 117 (3rd Cir. 1956); see also *Dopp v. Franklin National Bank*, 461 F.2d 879 (2d Cir. 1972).

The moving affidavit of the defendant and the related papers on the defendant's motion under Rule 60(b) made a prima facie showing that the judgment was obtained by mistake or excusable neglect. Gold swore that he did not know of the proceedings and that a judgment was entered against him based on an honest mistake (9a). He further demonstrated to the Court that there was no basis for the judgment and that he may have been entitled to a dismissal as a matter of law.

The defendant-appellee attempts to distinguish the *Flaks v. Koegel* case, 504 F.2d 702 (2nd Cir. 1974). In that case, the court wrote to the defendant and advised him of the pending motion to strike the answer and enter default judgment, as well as the motion by his counsel to withdraw. Gold did not receive any such notice from the court or from appellee's counsel at a time when it was apparent that Gold was for all intent and purpose without counsel. The plaintiff communicated directly with Gold only after the entry of default judgment.

In *Vindigina v. Meyer*, 441 F.2d 376 (2nd Cir. 1971) the court required personal notice once it became known that the

attorney who instituted the action had disappeared. "In the absence of a court order directing such service, the defendant's attorneys were at fault for failing to do what common sense required. In doing so, they took advantage of the plaintiff."

Contrary to *Flaks*, neither the court nor the appellees sent personal notice to the defendant until after judgment.

In summary, it is difficult to accept the appellees' assertion that Gold, having the ability to satisfy the judgment, knowing the allegations to be completely unfounded, would deliberately permit the entry of a default judgment in the amount of $169,000.

The appellees, having obtained victory by default, partially due to their failure to give personal notice, continue to resist Gold's requests for a trial on the merits. If they had intended to keep the spoils of their victory, they should have taken every precaution and afforded the defendant every opportunity to be heard.

CONCLUSION

The order denying the defendant's motion under Fed. R. Civ. Pro. 60(b) should be reversed.

Respectively submitted,

LAMPERT & LAMPERT
Attorneys for Defendant-Appellant

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

US COURT OF APPEALS: SECOND CIRCUIT

HANDEL

Plaintiff-Appellee,

- against -

GOLD,

Defendant-Appellant

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Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, James Steele, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 250 West 146th. Street, New York, New York
That on the 21st *day of* January *19*75 *at* *

deponent served the annexed Reply Brief *upon*

*

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* Attorney(s) *herein.*

Sworn to before me, this 21st
day of January *19*75

Robert T. Brin

James Steele

JAMES STEELE

* Borden & Ball- 345 Park Ave., New York

* Kaufman, Taylor, Kimmel & Miller- 41 E. 42nd St.

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975